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No. 90-1279

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MYRA JO COLLINS,
Petitioner,

VS.

THE CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

Like ships passing in the night, Respondent's Brief in Opposition and the Petition for Writ of Certiorari do not meet. They barely glide past one another, glancing against one another at a single point. Just as the Fifth Circuit did below (916 F.2d at 290-91; id. at 291, n. 10, Appendix at A13), Respondent "freely admits that *there is a conflict* between the Fifth Circuit's holding in this case and the Eighth Circuit's holding in *Ruge" v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989). Brief in Opposition at 13 (emphasis added); *id.* at 5-8. That conflict could not be more direct; yet Respondent seeks to minimize it by improperly characterizing the Eighth Circuit's decision as aberrational. Brief in Opposition at 6. To do this Respondent strains, without success, to explain away other more subtle conflicts between the Fifth Circuit's approach to claims under 42 U.S.C. Section 1983 brought against municipalities by their employees, and the approaches of other Circuits, including the Second, Third and Eleventh. Respondent also ignores the fact that none of the Circuit Court decisions relied upon by it or the Fifth Circuit

below, except for one other Fifth Circuit decision, was rendered after this Court's seminal decisions in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) and *De Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). By contrast Petitioner relies on post *Harris* and *De Shaney* decisions in the Third, Tenth and Eleventh Circuits in addition to the directly in-point Eighth Circuit decision in *Ruge*.

In this Reply Brief, Petitioner seeks to refocus the briefing on the actual issues and considerations that make this case suitable for the Court's plenary review.

REASONS FOR GRANTING THE WRIT

I

There Is A Direct Conflict In The Circuits On The Questions Presented, Which Should Be Resolved By This Court.

The conflict among the Circuits is much more pervasive and profound than Respondent contends. *Compare* Petition at 5-10 *with* Brief in Opposition at 5-13. Although admitting the direct conflict between the Eighth Circuit in *Ruge* and the Fifth Circuit below, Respondent obfuscates other more subtle conflicts.

To elucidate these conflicts, it is necessary to parse the Fifth Circuit's analysis of the issues in this case, which involves some explanation of the Fifth Circuit's error.

Respondent tries to eliminate all other conflicts among the Circuits by exalting the Fifth Circuit's approach to the first issue in the case, which Petitioner has stated as follows:

> 1. Whether the Estate of a deceased municipal employee states a claim for relief, pursuant to 42 U.S.C. Section 1983, when it alleges that the decedent's death resulted from the municipality's policy or custom of "deliberate indifference" to decedent's constitutionally protected rights under the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, where the Estate alleges both (1) the municipality's deliberately indifferent policy or custom of failing to train, equip or supervise employees, and

> (2) a direct causal link between that municipal policy or custom and the constitutional deprivation?
>
> Petition at i.

Both the Fifth Circuit and Respondent attempt to recast and beg that question as follows:

> The question presented in this case is whether a plaintiff seeking recovery under Section 1983 for injury to a government employee must demonstrate, inter alia, that the conduct in issue was an abuse of governmental power. More particularly, does alleged wrongful conduct by government—in its capacity as employer rather than as a governing authority—that deprives its employee of an alleged constitutional right give rise to a Section 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.
>
> 916 F.2d at 286, Appendix at A3; Brief in Opposition at 3.

Having thus reformulated the question, the Fifth Circuit and the Respondent then beg the question by simply declaring, without serious analysis, that "there is no abuse of power. . . . Accordingly this action cannot lie under Section 1983." 916 F.2d at 291, Appendix at A13; Brief in Opposition at 3. The Fifth Circuit decided that although adequately pleaded, "abuse of governmental power . . . cannot be present under any allegation in this action." 916 F.2d at 290 n.7, Appendix at A11 n.7.

The Fifth Circuit reaches this result essentially through repeated recapitulation of the conclusion that Petitioner

> ". . . made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*"; that the injury must "be attributed to a misuse of power made possible only because the City is clothed with authority of state law."

916 F.2d at 288, Appendix at A9, quoting *Rankin v. City of Wichita Falls*, 762 F.2d 644, 447, 449 (5th Cir. 1985) (emphasis in original). See Brief in Opposition at 6-7.

No guidance is given as to how a first amendment, equal protection, property or procedural due process claim by a municipal employee differs from the claims of deprivation of life, liberty or substantive due process claims presented in this case. Surely a first amendment, equal protection, property or procedural due process claim against a municipal employer often also involves "the abuse of power of which any private employer might be guilty." The only reason any of these claims can be stated under Section 1983 is that each involves a claimed deprivation of a federally protected constitutional right which the government must respect, regardless of the capacity in which it acts. The same can be true of a claim based upon deprivation of life, liberty or substantive due process.

The governmental versus proprietary dichotomy adopted by the Fifth Circuit is simply wrong. In assessing a Section 1983 claim the relevant inquiry is whether plaintiff asserts a federally protected right, not the capacity in which the municipality acted. Abuse of government power flows from the existence of the constitutional or federally protected right.

As the *Ruge* Court held in light of this Court's decision in *Harris*, any "abuse of governmental power" requirement merges into the causation and federally protected rights elements of the Section 1983 claim:

> Thus, where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action.
>
> 892 F2d at 741.
>
> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability. It is then that an abuse of government authority arises sufficient to state a cause of action under Section 1983.
>
> *Ruge*, 892 F.2d at 741 n. 6.

Thus, in the Section 1983 setting, in considering a Rule 12(b) F.R.CivP motion, municipal liability turns only on whether the following elements have been well pled:

1. A tortious act
2. performed under color of state law
3. that has caused an injury
4. through deliberate indifference of the municipality
5. that causes deprivation of a federally protected right.

The Fifth Circuit's inability or unwillingness to accept this analysis sets it apart not only from the Eighth Circuit but also from the Second Circuit in *McClary v. O'Hare*, 789 F.2d 83 (2nd Cir. 1986). See Ruge, 892 F.2d at 741 (so analyzing the *McClary* decision).

Moreover, despite Respondent's sophistic efforts to explain otherwise (Brief in Opposition at 8, 9-13), the Fifth Circuit's decision also is at odds with the post *Harris and De Shaney* decision of the Eleventh Circuit in *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 108 L.Ed.2d 785 (1990).

Cornelius specifically recognized that a claim may be asserted under Section 1983 against a municipality by one of its employees for personal injuries arising in the course of her employment. Notably, the Eleventh Circuit specifically held that the municipality owed its employee a federally cognizable duty of care arising directly from her employment relationship.

> . . . if Mrs. Cornelius wished to continue serving as the town clerk, she had to work in the environment created by the town officials; one that included routine exposure to prison inmates around the town hall. As Town Clerk, Mrs. Cornelius was required to submit to these conditions by her superiors, conditions well beyond the normal restrictive control inherent in an employer-employee relationship to which an employee agrees.
>
> 880 F.2d at 355.

Similarly, if the decedent herein wished to continue serving as a City sewer worker, "which involved conditions well beyond the normal restrictive control inherent in an employer-employee relationship to which an employee agrees," he had to work in the environment, created by city officials, that included routine unprotected exposure to poisonous sewer gas, due to his employer's deliberate indifference. Further, it is uncontested that under Texas law sewer work is exclusively a governmental function. *Compare* Petition at 5 (citing Texas Civil Practice and Remedies Code, Section 101.0215 (Vernon 1990)) *with* Brief in Opposition (which does not contest the point).

Finally, Respondent ignores entirely the implicit conflict in the Circuits, between the Fifth Circuit in the instant case, and the Third Circuit in *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989), *cert. denied,* 107 L.Ed.2d 835 (1990). Stoneking's interpretation of this Court's decision in *De Shaney,* focuses on the difference between tortious acts performed directly by state actors against Section 1983 plaintiffs and those in which private actors intervene, as in *De Shaney*. This distinction renders a number of the cas[illegible]d upon by the Respondent and the Fifth Circuit in the ins[illegible]ase, inapposite. With the exception of the instant case and [illegible]cond Circuit's decision in *McClary,* each of the other Circuit Court decisions relied upon by Respondent and the Fifth Circuit herein involved "intervening efficient" non-state action causes of plaintiffs' injuries. *Compare* Petition at 8-9 with 916 F.2d at 287-290, Appendix at A7-A11; Brief in Opposition at 5-6.

Suffice it to say there are both direct and indirect but profound and important conflicts among the Circuits presented by the Petition in the instant case that should call in play this Court's plenary review. See also *Ware v. Unified School District No. 492,* 902 F.2d 815 (10th Cir. 1990) (applying *Harris* to a wrongful termination claim in a public school setting).

II

This Case Raises Important Recurring Questions Of Federal Constitutional Law That Are Unresolved And That Should Be Resolved By This Court.

Respondent somehow misconceives Petitioner's second question presented and exploits its misconception as a basis for arguing that nothing of importance has been submitted to this Court for plenary review. *Compare* Petition at i with Brief in Opposition at 13-15. The error pertains to Petitioner's first question presented as well.

The questions in this case are *not,* as Respondent argues, whether there is a constitutional right to a safe workplace as that concept has evolved under common law tort and statutory workers compensation law. The questions are *(1)* whether a municipal employer's *deliberate indifference* to the health and safety of its employees can rise to the level of deprivation of a federally protected life, liberty or substantive due process right and *(2)* whether a state statute that requires all Texas employers (including municipalities) to inform and train their employees concerning workplace safety and to provide appropriate personal protective equipment, creates a substantive due process liberty interest or "entitlement" to be free from the very workplace hazards to which the Estate's decedent succumbed. Petition at i.

Both questions are obviously very important. Further, as to the first question, there is a clear conflict between the Fifth and Eighth Circuits, as well as other conflicts among the Circuits. Given these conflicts, Respondent cannot seriously contend that the issue has been resolved by this Court.

Nor does Respondent even try to suggest that the second question has been resolved by this Court, given the Court's specific reservation of the question in *De Shaney,* 489 U.S. at 2.

The Fifth Circuit avoided this question only by begging the question of "abuse of governmental power," and then simply refused to address the question. 916 F.2d at 287 n.3, Appendix at A6-A7 n.3. Such a question begging approach is wrong.

Nor is such question begging necessary to avoid converting Section 1983 into a common law tort statute. Careful attention to the federally protected right, causation and deliberate indifference elements of the Section 1983 claim are more than adequate protection against federalizing tort law. *Cf. Daniels v. Williams,* 474 U.S. 327, 335 (1986).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: March 28, 1991

Respectfully submitted,

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